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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GREEN WOOD PROPERTY, LLC et al.,

Plaintiffs and Appellants,

v.

SEMCO E & M CORP. et al.,

Defendants and Respondents.

E070096

(Super.Ct.No. CIVDS1713691)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge.
Affirmed.

Gaglione, Dolan & Kaplan, Robert T. Dolan and Amy J. Cooper for Plaintiffs and
Appellants.

Robert C. Hsu and Spencer Y. Wong for Defendants and Respondents.

Plaintiffs and Appellants Green Wood Property, LLC (Green Wood) and
American Continental Bank, a California Banking Corporation (collectively, Plaintiffs)
appeal the denial of their request for a preliminary injunction to enjoin defendants and
respondents Semco E&M Corporation, a Taiwanese corporation (Semco); County

Records Research Inc., a California Corporation; Spencer Tsai, Shih-Pan Tsai and Carlon Tsai (collectively, Defendants) from proceeding with a trustee's sale on a four-bedroom apartment building located on Lugo Avenue in San Bernardino (the Property).

Wing Ng purchased the Property in 2012 and at the time executed a deed of trust with Semco as the beneficiary in the amount of \$183,000 secured to the Property (Semco DOT). The Semco DOT was recorded. Ng made no payments on the Semco DOT. Ng gifted the Property to Amaxi Investment Corporation (Amaxi). Amaxi sold the Property to Green Wood. Green Wood purchased the Property despite the fact that Semco had filed a notice of default against Ng for failing to pay on the Semco DOT. Semco scheduled a trustee's sale. Plaintiffs' insisted the Semco DOT was fraudulent and filed a complaint against Defendants for wrongful foreclosure, declaratory relief and cancellation of instrument. Plaintiffs also filed an ex parte application for temporary restraining order and stay and order to show cause (Preliminary Injunction) to stay the trustee's sale of the Property pending the litigation. Plaintiffs' request was denied by the trial court, finding that they had not shown a probability of prevailing on the merits.

On appeal, Plaintiffs' claim (1) the trial court abused its discretion by denying the Preliminary Injunction by focusing solely on whether Plaintiffs would prevail on the merits rather than first considering if Plaintiffs were more likely to suffer injury from the denial of the injunction than Defendants were likely to suffer if it was granted; (2) the trial court predetermined that the Semco DOT was valid without considering the facts; and (3) the Semco DOT was a legal nullity as it did not secure any legally enforceable right.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

On October 5, 2017, Plaintiffs filed their first amended complaint (FAC) alleging causes of action against Defendants for wrongful foreclosure, declaratory relief and cancellation of instrument. Ng had purchased the Property on December 6, 2012. The grant deed was recorded on December 21, 2012. Semco provided a purchase loan to Ng in the amount of \$183,000 secured by the Property. On December 21, 2012, the Semco DOT, naming Semco as the beneficiary and Ng as the trustor, was filed in the County of San Bernardino. Spencer Tsai was the president of Semco and a California Corporation affiliated with Semco, Semsons & Co. Susan Tsai was an officer and director at both Semco and Semsons & Co. Carlon Tsai was also a director at both companies.

On February 1, 2013, Ng gifted the Property to Amaxi and the grant deed was recorded on March 7, 2013. In October 2016, escrow opened in the sale of the Property to Green Wood from Amaxi. The escrow agent was Selina Kwan. Amaxi transferred the Property by grant deed to Green Wood; the grant deed was recorded on May 16, 2017. Green Wood obtained a loan for the Property from American Continental Bank, a California Banking Corporation, in the amount of \$280,000.

However, on March 20, 2017, prior to the close of escrow, Semco filed a notice of default and election to sell under deed of trust (NOD). The NOD stated the amount due as of the filing of the NOD was \$14, 645.50 to Semco from Ng. County Records Research, Inc. was substituted as the trustee on June 23, 2017. On March 22, 2017,

Kwan, the escrow agent being used by Green Wood, notarized the substitution of trustee. The document was also signed by Spencer Tsai.

On June 23, 2017, a notice of trustee's sale was filed on the Semco DOT, to take place on July 25, 2017. It was estimated that the unpaid balance and other charges totaled \$207,769.26. Ng was the defaulted debtor.

Plaintiffs' first cause of action in the FAC was for wrongful foreclosure. They insisted there was no existing indebtedness between Ng and Semco. Ng never received any of the loan proceeds from Semco and was never asked to make payments on the loan. Although money may have changed hands through escrow, this did not create an obligation on the part of Ng. The Semco DOT was a legal nullity and could not support the trustee's sale. Any trustee's sale would be illegal and fraudulent. Semco was aware when it filed the NOD that the Property was in escrow but waited until escrow closed to foreclose rather than seeking a payoff from escrow.

The second cause of action for declaratory relief sought a determination on the legality of the Semco DOT. The third cause of action sought cancellation of the Semco DOT.

B. PRELIMINARY INJUNCTION

Plaintiffs filed their Preliminary Injunction on the same day as the FAC. They sought to stay the trustee's sale on the Semco DOT contending "clear evidence" existed that the Semco DOT did not secure any obligation or indebtedness on the part of Ng. The Semco DOT was a legal nullity. The trustee's sale was fraudulent. They argued they would suffer irreparable harm if the trustee's sale was not stopped. They would lose the

Property. Plaintiffs' insisted they would prevail on the merits. The trustee's sale was scheduled for October 10, 2017.

Attached to the Preliminary Injunction was a declaration from Ng. Ng admitted he owned the Property between December 6, 2012, and February 1, 2013. He granted the Property to Amaxi without any consideration. He admitted he signed the Semco DOT but claimed he did not know it was a loan document. He never received funds from Semco on the loan. He was never contacted about making payments on the Semco DOT.

A temporary restraining order was granted to Plaintiffs on October 6, 2017. Semco, Spencer Tsai, Carlon Tsai and Susan Tsai filed opposition to Plaintiffs' Preliminary Injunction. Defendants insisted Ng did receive the loan proceeds from the Semco DOT (through escrow) and agreed to be subject to the indebtedness. They presented evidence that Ng had not only signed the Semco DOT, but also initialed and signed escrow instructions that referenced the Semco DOT, and that he would be obligated to pay the loan. Ng's declaration should not be believed. They also provided evidence that Ng had been a certified public accountant but had his license suspended due to negligent acts and false advertising. Ng was not a trustworthy individual.

Defendants contended the loan proceeds went through escrow so Ng could buy the Property; he received the benefit of the loan. Further, Ng received notice once the purchase of the Property was completed that mentioned the Semco DOT and that he would be notified about making payments. Ng was responsible for the Semco DOT and had failed to pay. The Semco DOT gave Semco the right to foreclose.

C. HEARING ON THE PRELIMINARY INJUNCTION

The hearing was conducted on November 20, 2017. The trial court immediately noted the Semco DOT was of record before the close of escrow along with the NOD. Plaintiffs could not claim ignorance of the encumbrance before the close of escrow. Counsel for Plaintiffs stated “why didn’t Semco, who knew that the property was being sold, not issue a demand statement?” The trial court responded, “Well, more to the point, why did your client close escrow knowing that there was a Deed of Trust out there?” Plaintiffs’ counsel responded, “I guess they—somehow the Deed of Trust got missed.” She argued Green Wood believed it had been paid off.

Plaintiffs’ counsel argued there was “funny business” involved as Kwan, Green Wood’s escrow agent, was involved with the substitution of trustee for Semco. Plaintiff’s counsel insisted Ng was not the real debtor on the loan; however, she also admitted he signed the Semco DOT. Counsel also argued it did not make sense that Ng gifted the Property to Amaxi but remained liable on the loan. Plaintiffs’ counsel also admitted that the loan money was deposited into escrow and went to the seller of the Property. However, the real debtor was intended to be Amaxi.

The trial court asked, even if it accepted Plaintiffs’ arguments, what difference it made. Plaintiffs’ counsel again insisted Ng was not the actual debtor and the actual name of the debtor must appear on the note. Defendants’ counsel responded Ng knew he was signing a loan and that there was no evidence he was just a straw buyer for Amaxi.

The trial court addressed Ng’s declaration. Ng claimed not to receive any proceeds of the loan but he would not have received the money as it would have gone to

the seller through escrow. Further, the fact he had not made any payments on the loan was why Semco was seeking to foreclose. Plaintiffs' counsel argued there was no evidence Semco ever pursued Ng for the loan.

The trial court was advised by the parties that the trustee's sale was set for December 10, 2017. The trial court did note a bond in the amount of the obligation would protect Semco's interest. The trial court stated, "On the other hand, simply because a bond will protect an interest doesn't . . . authorize the issuance of a preliminary injunction. I've got to balance the interest. And the likelihood of success on the merits is a factor that I must consider. [¶] Here's what I don't understand. Semco's obligation, the Deed of Trust and the Notice of Default, were both recorded documents before escrow closed. How can you prevail in light of those facts?" Plaintiffs' counsel argued that there was possibly something going on between the escrow agent and Semco. Plaintiffs' counsel argued, "There's a lot to untangle here."

The trial court responded, "Well, I'm not sure there is. [¶] Thank you for your arguments. The motion for preliminary injunction is denied."

There is nothing in the record indicating a notice of entry of judgment was filed. On March 2, 2018, Plaintiffs appealed from the denial of their Preliminary Injunction. An order denying a preliminary injunction is an appealable order. (Code of Civ. Proc.,

§ 904.1, subd. (a)(6).) Semco filed a cross complaint against Ng on November 20, 2017, for fraud for refusing to agree there was a loan.¹

DISCUSSION

Plaintiffs' claim the trial court abused its discretion when it solely focused on whether Plaintiffs would prevail on the merits rather than balancing whether they were more likely to suffer greater injury from the denial of the injunction than Defendants were likely to suffer if it was granted. Plaintiffs also argue the trial court predetermined that the Semco DOT was secured by a legitimate debt with a legitimate power of sale by allowing the trustee's sale to continue. The trial court failed to consider the substantial evidence supporting Plaintiffs' position. Finally, the Semco DOT was a legal nullity because Ng attested that he was never contacted about making any payments on the loan and never made any payments. Since the Semco DOT was a legal nullity, the power of sale in the Semco DOT has no legal force and cannot be invoked. We conclude the trial court did not abuse its discretion in denying the Preliminary Injunction.

“In deciding whether to issue a preliminary injunction, a court must weigh two ‘interrelated’ factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction.” (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.)

“The likelihood of plaintiffs’ ultimate success on the merits ‘does affect the showing necessary to a balancing-of-hardships analysis. That is, the more likely it is that

¹ Plaintiffs filed a petition for writ of mandate in this court seeking an order staying the trustee's sale. That petition was denied on February 21, 2018.

plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. This is especially true when the requested injunction maintains, rather than alters, the status quo. [Citation.] . . . [I]t is the mix of these factors that guides the trial court in its exercise of discretion.’ [Citations.] The presence or absence of these interrelated factors ‘is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party’s inability to show that the balance of harms tips in his favor.’ ” (*Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 342, italics omitted.) “A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim.” (*Butt v. State of California, supra*, 4 Cal.4th at p. 678; see also *Pro-Family Advocates v. Gomez* (1996) 46 Cal.App.4th 1674, 1681.)

The trial court may consider the verified complaint and answer as well as declarations, affidavits, and oral testimony before deciding a preliminary injunction motion. (*Jessen v. Keystone Savings & Loan Assn.* (1983) 142 Cal.App.3d 454, 460.) Appellate review is limited to whether the trial court's decision was an abuse of discretion. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.)

In *Yu v. University of La Verne* (2011) 196 Cal.App.4th 779 (*Yu*), *Yu*, a law student, was found by the University to have committed plagiarism and academic dishonesty. *Yu* appealed the punishment—suspension from school for the remaining academic year and censure—insisting it violated Education Code section 94367. (*Yu*, at

pp. 783-784.) Yu filed a request for a preliminary injunction enjoining the University from enforcing the suspension. The trial court found there was insufficient evidence to conclude she would prevail on the merits. It did not consider the second factor, considering the harm to Yu if the Preliminary Injunction was not issued. (*Id.* at p. 786.)

The appellate court upheld the trial court's order finding that Yu was not likely to prevail on the merits. It concluded, "the second factor the trial court must consider in determining whether to grant a motion for a preliminary injunction is 'the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued.'"

[Citation.] The trial court did not consider the second factor because it determined that Yu did not show she was likely to prevail on the merits. Because we agree with the trial court with respect to the merits, we come to the same stopping point. We do not reach the issue of whether the balance of harms favors granting a preliminary injunction." (*Yu*, *supra*, 196 Cal.App.4th at p. 793.)

We conclude that the trial court did not abuse its discretion in denying the Preliminary Injunction on the basis that Plaintiffs would not prevail on the merits of their claims. "A trustee's deed conveys the absolute legal title to the purchaser, as against all claims subordinate to the deed of trust, but subject to all prior rights, interests, and titles." (*R-Ranch Markets #2, Inc. v. Old Stone Bank* (1993) 16 Cal.App.4th 1323, 1327.) "Therefore, if the trustor has notice, actual or constructive, of an encumbrance which existed prior to the trust deed, the trustor takes title to the property subject to the encumbrance." (*Ibid.*)

Here, the Semco DOT was recorded. The NOD also had been filed before escrow closed on the purchase by Plaintiffs. Plaintiffs purchased the Property despite actual or constructive notice of the existing Semco DOT. Plaintiffs cannot now complain they believe the Semco DOT was fraudulent because they failed to investigate the matter and decided to purchase the Property despite the existing encumbrance.²

Further, although Plaintiffs argue the evidence was uncontroverted that the Semco DOT was invalid, there was conflicting evidence. “ “Where the evidence before the trial court was in conflict, we do not reweigh it or determine the credibility of witnesses on appeal. ‘[T]he trial court is the judge of the credibility of the affidavits filed in support of the application for preliminary injunction and it is that court’s province to resolve conflicts.’ [Citation.] Our task is to ensure that the trial court’s factual determinations, whether express or implied, are supported by substantial evidence. [Citation.] Thus, we interpret the facts in a light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court’s order.’ ” (*Yu, supra*, 196 Cal.App.4th at p. 787.)

Plaintiffs presented the declaration of Ng. In that declaration, Ng admitted he owned the Property for a period of time, then transferred it to Amaxi. He also admitted that he was listed as the beneficiary on the Semco DOT and that he signed the document.

² Plaintiffs’ counsel was unclear about whether Plaintiffs were aware of the Semco DOT when they purchased the Property. She indicated at one point Plaintiffs believed it had been paid off and then stated it was missed by the title insurance. Either way, Plaintiffs were aware of the Semco DOT, or the title insurance company may be liable to Plaintiffs.

He attested he was unaware he was signing a loan document and never received any of the funds from Semco. Further, he was never contacted to make payments. The trial court found that Ng was not credible. It noted Ng declared he did not receive any proceeds of the loan, but that money would not go directly to Ng. Further, the fact he did not make any payments on the loan was the reason for the foreclosure.

This determination was supported by substantial evidence. Ng's declaration was contradicted by the mere fact he admitted he took ownership of the Property. It is incredulous he took possession of the Property without having to pay for it, and Ng did not explain how he otherwise obtained the funds to purchase the Property. Further, the page of the Semco DOT that he signed included language that it was a deed of trust. Finally, as provided by Defendants, Ng initialed and signed escrow instructions and the note, which included he would be obtaining a loan from Semco to finance the purchase of the Property. Ng's declaration was dubious and did not establish that Plaintiffs would probably prevail on the merits. The trial court did not abuse its discretion by denying the Preliminary Injunction.

Plaintiffs' additionally argue that by allowing the trustee's sale to continue, the trial court predetermined that the Semco DOT was valid without considering the facts presented. As set forth *ante*, the trial court did consider the facts. Moreover, the trial court only considered that Plaintiffs did not have a "probability" of prevailing and did not determine the merits of the controversy. Trial was set to determine the issue. "[T]he order for a preliminary injunction does not determine the ultimate right to a permanent injunction—i.e., a preliminary injunction is not a determination on the merits—unless the

question before the trial court is one of law alone that can be resolved without resort to extrinsic or additional evidence.” (*Yee v. American National Ins. Co.* (2015) 235 Cal.App.4th 453, 457-458.) Clearly, the decision in this case is based on extrinsic evidence and will be decided at trial.

Plaintiffs’ final claim appears to request that this court make the ultimate determination that the Semco DOT was a legal nullity. This court only reviews the determination of whether the trial court properly issued the Preliminary Injunction. This court cannot make a determination that the Semco DOT was in fact invalid, as that decision is reserved for the trial court to determine at trial. Here, the trial court was only tasked with determining whether to issue a preliminary injunction and this court can only review that decision. The trial court properly denied the Preliminary Injunction.

DISPOSITION

We affirm the order of the trial court. Costs of appeal are awarded to respondents as the prevailing party.

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MILLER

J.

We concur:

RAMIREZ

P. J.

RAPHAEL

J.